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RHB BANK BHD

v.

AMALAN TEPAT SDN BHD & ORS

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-183-2005]
16 JANUARY 2007

C ***CIVIL PROCEDURE:*** *Interpleader - Determination - Balance sum of housing loan - Release of - Whether balance sum of housing loan should be released by plaintiff to first defendant - Whether plaintiff under contractual obligation to release loan - Whether second and third defendants have given irrevocable authority to plaintiff to release progress* D *payments - Whether second and third defendants' purported termination of SPA valid - Whether plaintiff bound by undertaking*

This was the plaintiff's application by way of an originating summons in encl. 1 under O. 17 r. 1(1)(a) of the Rules of the E High Court 1980 for relief by way of interpleader, seeking *inter alia* a determination as to whether the balance of the second and third defendant's housing loan should be released by the plaintiff to the first defendant *vide* the plaintiff's undertaking dated 23 March 1996 given to the first defendant pursuant to an irrevocable F authority given by the second and third defendants to the plaintiff. The first defendant was the licensed developer of a housing project known as Condominium A Famosa Villa De Agua ('the Condominium') erected on a piece of land. *Vide* sale and purchase agreement ('the SPA') the first defendant agreed to sell, and the G second and third defendants agreed to purchase two lots ('the lots'). To finance the purchase, the second and third defendants obtained a housing loan of RM186,900 from the plaintiff ('the loan'). Under s. 5.02 of the loan agreement and deed of assignment (LADA), the second and third defendants have given H the plaintiff express and irrevocable authority to advance or pay the whole of the loan or part thereof to the first defendant based on the architect's certificates. As at April 12 2005, the plaintiff has released a total sum of RM109,935 to the first defendant based on the architect's certificates. *Vide* letter dated 7 December 2004, I the second and third defendants notified the plaintiff that they have terminated the SPA and requested the plaintiff not to release

any further payment. The plaintiff now applied for the above determination in relation to the release of RM76,965 which represented 41% of the balance of the loan.

Held:

(1) Upon a true construction of the plaintiff's undertaking, the plaintiff was under a contractual obligation to release to the first defendant the balance of the loan. This view was further fortified by s. 5.02 of the LADA pursuant to which the second and third defendants have given irrevocable authority to the plaintiff to release progress payments to the first defendant as stipulated in the SPA. The existence of such irrevocable authority would disentitle the second and third defendants from preventing the release of the balance of the loan by the plaintiff to the first defendant, especially when it was not in evident as to whether the second and third defendants' purported termination of the SPA was valid or otherwise. (paras 20 & 21)

(2) The plaintiff was clearly bound by the undertaking and the second and third defendants were unable to extricate themselves from the irrevocable authority given to the plaintiff as that irrevocable authority was still subsisting. On the foregoing grounds, the answer to the relief sought by the plaintiff was in the affirmative *ie*, the plaintiff shall release to the first defendant the balance of the loan. (paras 23 & 24)

[Order accordingly; parties to bear their own costs respectively.]

Case(s) referred to:

Michael C Solle v. United Malayan Banking Corporation [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***

Public Bank Bhd v. Perwira Affin Bank Bhd [2001] 7 CLJ 447 HC ***(refd)***

Re Choe Kuan Him, Advocate & Solicitor; T Damodaran v. Choe Kuan Him [1975] 2 MLJ 274 ***(refd)***

United Malayan Banking Corp Bhd v. Warisan Niaga (M) Sdn Bhd & Ors [1990] 2 CLJ 110; [1990] 3 CLJ (Rep) 318 HC

Legislation referred to:

Rules of the High Court 1980, O. 17 r. 1(1)(a)

Other source(s) referred to:
Mallal's Digests of Malaysian and Singapore Case Law, 4th edn 1998 Reissue, para 2426

For the plaintiff - Sharifah Shewikar Alhabshi (Zairin Dzainal Abidin with her); M/s Taye & Co
For the 1st defendant - Wan Mohamed; M/s Tee, Tan & Partners
For the 2nd & 3rd defendants - Diana Seah; M/s Diana Seah & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

[1] This is the plaintiff's application by way of an originating summons in encl (1) under O. 17 r. 1(1)(a) of the Rules of the High Court 1980 for relief by way of interpleader, seeking *inter alia* a determination as to whether the balance of the second and third defendants' housing loan should be released by the plaintiff to the first defendant *vide* the plaintiff's undertaking dated 23 March 1996 given to the first defendant pursuant to an irrevocable authority given by the second and third defendants to the plaintiff.

Factual Background

[2] The first defendant is the licensed developer of a housing project known as Condominium A'Farmosa Villa De Agua ("the Condominium") erected on land held under PT No. 61, HS(D) 3386, in the mukim of Pegoh, district of Alor Gajah Melaka.

[3] *Vide* sale and purchase agreement dated 29 September 1995 ("the SPA") the first defendant agreed to sell, and the second and third defendants agreed to purchase Lot No. B1/B/22-6, 22nd Floor, Block 1 together with an additional Lot No. B1/LG/05 of the Condominium ("the lots").

[4] To finance the purchase, the second and third defendants have obtained a housing loan of RM186,900 from the plaintiff ("the loan").

[5] Pursuant to a loan agreement and deed of assignment dated 4 September 1995 ("the LADA") the first and second defendants have absolutely assigned to the plaintiff their rights and title to the Lots. The plaintiff has made progress payments in accordance with the architect's certificates.

[6] Under s. 5.02 of the LADA, the second and third defendants have given the plaintiff express and irrevocable authority to advance or pay the whole of the loan or part thereof to the first defendant based on the architect's certificates. S. 12.10 renders the second and third defendants liable to pay all fees, costs and expenses on a solicitor-client basis.

[7] The plaintiff has *vide* letter dated 23 March 1996 given the first defendant an undertaking to release progress payments to the first defendant based on the architect's certificates.

[8] In consideration of the provisions in the LADA, *vide* letter dated 5 April 1996, the first defendant has given to the plaintiff a cross-undertaking and consent to *inter alia* refund all monies released by the plaintiff.

[9] As at 12 April 2005, the plaintiff has released a total sum of RM109,935 to the first defendant based on the architect's certificates.

[10] *Vide* letter dated 7 December 2004, the second and third defendants notified the plaintiff that they have terminated the SPA and requested the plaintiff not to release any further payment.

[11] The plaintiff has now applied for the above determination in relation to the release of RM76,965 which represents 41% of the balance of the loan.

Interpleader Relief

[12] At this juncture, it is appropriate for me to examine the nature and effect of the plaintiff's application under O. 17 r. 1(1)(a) which where relevant merits reproduction as follows:

A O. 17: Interpleader

Entitlement to relief by way of interpleader.

1(1) Where -

B (a) a person is under a liability … in respect of any money … and he is, or expects to be, sued for or in respect of that …. money … by two or more persons making adverse claims thereto,

(b) (not relevant)

C the person under liability as mentioned in sub-paragraph (a) … may apply by way of interpleader.

The above factual background shows that the plaintiff is the person referred to in O. 17 r. 1(1)(a).

D

[13] In *Tong Lee Co. Pte Ltd v. Koh Chiow Meng & Anor Mallal's Digests of Malaysian and Singapore Case Law*, 4th edn 1998 Reissue para 2426, KS Rajah JC of the Singapore High Court explained that interpleader proceedings are not, in the strictest sense, E proceedings against anybody, but it is a proceeding, the object of which is to extricate the claimant, the solicitors in this case, from the embarrassment of being sued, or likely to be sued, by more than one party in respect of the same subject-matter, and also having as its object to put the claimants in a position in which, if F they are going to insist upon their claims, they should do so when the application was made.

Undertaking And Irrevocable Authority

[14] Plaintiff's learned counsel Puan Sharifah Shewikar Alhabshi G (Ms Zairin Dzainal Abidin with her) submitted that the second and third defendants had terminated the SPA on 1 November 2003 and the first defendant had not stated whether such termination was valid or binding on the first defendant.

H **[15]** First defendant's learned counsel Mr. Wan Mohamed relied on the plaintiff's undertaking given to the first defendant and the irrevocable authority given by second and third defendants to the plaintiff, to support his contention that the balance of the loan should be released to the first defendant.

I

[16] No submission was presented by learned counsel for the second and third defendants. A

[17] In my judgment, the answer to the above submissions is to be ascertained by a true construction of the plaintiff's undertaking given by the plaintiff's solicitors *vide* letter dated 29 March 1996 to the first defendant. Pursuant to this undertaking, the plaintiff has expressly agreed to release the loan to the first defendant progressively in accordance with the Schedule of Payments as stipulated in the SPA so long as the first defendant complies with the conditions prescribed by the plaintiff. B C

[18] In *Michael C Solle v. United Malayan Banking Corporation* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267, Hashim Yeop A Sani FJ (later CJ (M)) speaking for the Federal Court explained that the principles of construction to be applied to an undertaking are similar to those to be applied to an ordinary contract and the intentions of the parties are to be gathered from the language used, as they are presumed to have intended what they said. D

[19] In the context of the plaintiff's undertaking ie, from a bank, it is similar in effect as that of a bank guarantee, performance bond or standby letter of credit, and should be given due recognition similar to an undertaking from a solicitor, to be construed strictly against the bank issuing it: per Kamalanathan Ratnam J (as he then was) in *Public Bank Bhd v. Perwira Affin Bank Bhd* [2001] 7 CLJ 447. E F

[20] In the circumstances, I am of the view that upon a true construction of the plaintiff's undertaking, the plaintiff is under a contractual obligation to release to the first defendant the balance of the loan. G

[21] My view is further fortified by s. 5.02 of the LADA pursuant to which the second and third defendants have given irrevocable authority to the plaintiff to release progress payments to the first defendant as stipulated in the SPA. The existence of such irrevocable authority would disentitle the second and third defendants from preventing the release of the balance of the loan by the plaintiff to the first defendant, especially when it is not evident as to whether the second and third defendants' purported termination of the SPA is valid or otherwise. H I

[22] A substantially similar situation arose in *Public Bank, supra,* where an undertaking was given by the defendant and addressed to the plaintiff. The undertaking stated *inter alia* that the defendant giving the loan was to release payments to the developer's account. The purchaser then instructed the defendant not to pay out on his loan. It was held by Kamalanathan Ratnam J (as he then was) that this instruction would not affect the defendant's undertaking to the plaintiff. His Lordship referred to *United Malayan Banking Corp Bhd v. Warisan Niaga (M) Sdn Bhd & Ors* [1990] 2 CLJ 110; [1990] 3 CLJ (Rep) 318 where Siti Norma Yaakob J (later CJ (M) quoted with approval the case of *Re Choe Kuan Him, Advocate & Solicitor; T Damodaran v. Choe Kuan Him* [1975] 2 MLJ 274 which held that the fact that subsequent to the undertaking events occur which alter the position, such as the client withdrawing or changing his instructions before the undertaking has been honoured, will not entitle the solicitor to avoid liability unless he has expressly guarded against those events in the undertaking itself, as the standard required is so high that the courts have allowed only one defence, that of mistake.

[23] In the circumstances, the plaintiff in the instant application is clearly bound by the undertaking and the second and third defendants are unable to extricate themselves from the irrevocable authority given to the plaintiff as that irrevocable authority is still subsisting.

Conclusion

[24] On the foregoing grounds, the answer to the relief sought by the plaintiff is in the affirmative ie, the plaintiff shall release to the first defendant the balance of the loan.

Costs

[25] In view of the nature and effect of relief by way of interpleader under O. 17 r. 1(1)(a) and it was commenced by reason of the defendants' inability to resolve their dispute, the plaintiff should not be ordered to pay the costs of this application. I therefore direct that the parties herein shall bear their own costs respectively.